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**Substance over form**

**The ATAD Directive and its whereabouts**

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The ATAD I Directive (2016) imposes to all EU MS to introduce in their domestic legislation a general anti-abuse rule (GAAR). A MS must ignore arrangements or series of arrangements put in place for the main purpose or having as one of their main purposes obtaining a tax advantage (subjective element) that defeats the object of the applicable tax law or its purpose (objective element).

An arrangement or a series thereof is not genuine to the extent it is not put into place for valid commercial reasons which reflect economic reality.

The tax is then calculated in accordance with national law

The provision is to be compared with previous case law of the ECJ considering as abusive wholly artificial arrangements<sup>1</sup>.

The preamble to the ATAD directive confirms however that “otherwise the taxpayer should have the right to choose the most efficient tax structure for its commercial affairs”.

The GAAR must apply in domestic situations within the Union and vis-à-vis third countries in a uniform manner so that the application in domestic and cross-border situations does not differ. The GAAR is a protection against aggressive tax planning consistent with the BEPS reports.

It aims at improving the “effectiveness of the internal market in tackling tax avoidance practices”.

The GAAR has been transposed in different ways. Some countries consider that their already existing domestic GAAR suffices to transpose the ATAD GAAR. Other countries have added the ATAD GAAR to their domestic legislation. Belgium belongs to the first group of countries and considers that its GAAR (CTI, art. 344, § 1, redrafted in 2012) is a sufficient transposition of Article 6 of the ATAD I.

Fiscal abuse may be demonstrated by the tax administration by presumptions or other means of evidence in the light of objective circumstance. Abuse will exist when the taxpayer by a legal action, or a set of legal actions realizes an operation 1°. by which he avoids the application of a legal tax provision in violation of the objectives of the provision or 2°. claims a tax benefit under a legal tax provision, the grant of which is contrary to the objectives of this provision is his essential aim is to obtain this benefit.

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<sup>1</sup> Halifax (VAT); Cadbury Schweppes (CT).

The taxpayer may prove that the choice of his action(s) is justified by other motives than the avoidance of tax.

France has chosen to implement the ATAD GAAR by specific provisions which are the same for ATAD and for the new anti-abuse rule introduced in the parent-subsiary directive<sup>2</sup>.

Specific anti-abuse rules (SAARs) will be also found in the parent-subsiary directive, the new clause being identical to the ATAD I clause<sup>3</sup>. In the merger directive, the directive may be disapplied when the objective of the reorganization is tax evasion or avoidance and creating a presumption that it will be so if the operation is not carried out for valid commercial reasons.

The interest-royalty directive<sup>4</sup> also includes a provision disaplying it if the purpose of the taxpayer is tax evasion, tax avoidance or abuse. It will apply only if the entity receiving the income is the beneficial owner of the interest or royalty<sup>5</sup>.

Does the directive compel the MS to tax an item of income ? So far, directives had compelled them to exempt income in the case of mergers, dividend distributions, etc., but for the modification of the parent-subsiary directive compelling MS to tax to the parent profits distributed by a subsidiary if they are deductible.

The Belgian Constitutional Court<sup>6</sup> considered that the Belgian GAAR is a procedural rule relating to evidence and thereby avoided the problem.

The same clause was introduced in the OECD Model Tax Treaty<sup>7</sup> and in the Multilateral Instrument<sup>8</sup> to deny the benefits of a treaty if obtaining that benefit was one of the principal purposes of an arrangement or transaction unless granting the benefit is in accordance with the object and purpose of the treaty provision.

In two recent cases<sup>9</sup> the ECJ refused to apply respectively the interest and royalty directive or the parent-subsiary directive when Danish companies channeled interest or dividends to third country (and tax haven) entities through EU conduit companies, considering first that a mere conduit construction is an abuse of law and applying also the beneficial ownership concept as a condition of the withholding tax exemption.

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<sup>2</sup> Art. 205 A and Art. 119ter 3 CGI.

<sup>3</sup> Art. 3.2.

<sup>4</sup> Art. 5.

<sup>5</sup> Art. 1.1.

<sup>6</sup> Nr. 141/2013 of 30 October 2013.

<sup>7</sup> Art. 29.

<sup>8</sup> Art. 7.

<sup>9</sup> N Luxembourg 1 e.a. C-1115/16, etc. ; T Danmark and Y Denmark C-116/16 and C-117/16.